Supreme Court, U.S.
FILED
JUL 1 - 2005
OFFICE OF THE CLERK

No. 05-45

In The
Supreme Court of the United States

ROBERT LINDERMAN,

Petitioner,

vs.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Ninth Circuit's new rule of law requiring officers to use discretion not to seize all evidence lawfully called for by a warrant consistent with Fourth Amendment jurisprudence?

II. a. Can an officer be denied qualified immunity for seizing all indicia commanded by a constitutionally particularized warrant, based on the Ninth Circuit's general statement that the Fourth Amendment prohibits "unreasonable executions of search warrants?"

b. Will the Ninth Circuit's continued reliance on general statements of the law effectively eviscerate the qualified immunity doctrine that this Court created for sound policy reasons?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

LIEUTENANT ROBERT LINDERMAN of the Santa Clara County Sheriff's Office.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, an unincorporated association, James Arnett, Marnie Arnett, Robert Brancato, Leslie Brancato, Ronald Cook, Vickie Bozzi, Fillmore Cross, Margaret Cross, Ted Demello, Deborah Van Tassel, James Elrite, Molly Elrite, Larry Gorham, Jeffrey Pettigrew, Christine Pettigrew, James Souza, Robert Vieira, Lori Vieira, James Welch, Gregory Wilkins, and Denise Wilkins.

Officer Manion,[1] Officer Newman, Officer Knox, Officer Messier, Officer Carney, Officer Nieves, Officer Little, and Sergeant Decena.

[1] City of San Jose officers are filing a separate Petition to this Court based on a different issue that was addressed in the same Ninth Circuit opinion.

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UNITED STATES CODES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1983 4

CALIFORNIA CODES

Penal Code § 186.22 2

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Ninth Circuit is reported at 402 F.3d 962. Appendix ("App.") 1-39. The opinions of the district court are unreported. App. 40-63.

BASIS FOR SUPREME COURT JURISDICTION

The Ninth Circuit entered judgment on April 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Execution of The Indicia Search Warrants

Petitioner Lieutenant Robert Linderman ("Linderman") of the County Sheriff's Office headed an investigation into the beating death of a man at the Pink Poodle,

an Adult Men's Club. Linderman learned through his investigation that Steve Tausan ("Tausan"), a member of Respondent San Jose Charter of the Hells Angels ("Hells Angels"), committed the murder and suspected that other members were actively assisting in a coverup. App. 45.

Specifically, a security guard at the nightclub informed Linderman that the victim was harassing a nude dancer and the victim was told that the Pink Poodle employed Hells Angels as bouncers. App. 6. In response, the victim began bad-mouthing the Hells Angels. App. 6. The owner called Tausan, who arrived 10 minutes later and beat the victim to death. A witness told Linderman that members of the Hells Angels were hiding a videotape depicting the murder. App. 6. Because of confidential informants and other information learned during the investigation, the murder was thought to be gang related. App. 6.

In January 1998 a magistrate issued search warrants for nine residences and the Hells Angels clubhouse. Linderman was the affiant. The warrants sought Hells Angels meeting minute notes believed to discuss coverup efforts, a missing videotape surveillance depicting the murder, and indicia of Hells Angels gang affiliation. App. 7.

The District Attorney's Office wanted the indicia in order to obtain a sentence enhancement pursuant to California Penal Code § 186.22 establishing that the murder was committed for the benefit or at the direction of the Hells Angels street gang. App. 7-8, 13. The indicia would establish that the members had common symbols, which in turn would qualify it as a street gang. App. 4.

So far as pertinent to this Petition, the warrants signed by the magistrate each provided:

> YOU ARE THEREFORE **COMMANDED**, in the daytime, to make search of the premises . . . for the following property:
>
> * * *
>
> 2) ***Any*** evidence of membership in, affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to ***"Hells Angels," "HA", "Red & White," "81", "Big Red Mac ine", "HAMC", including, but not limited to, "West Coast OM notes," "East Coast OM notes", "BHC newsletter", including, but not limited to drawings, paintings, photographs, photograph albums, videotapes, writings, furniture, furnishings, fixtures, and objects*** known, or which may appear by content, to depict or contain mention of membership in, affiliation with, activity of, or identity of, any gang, including, but not limited to, the following: names, initials, and monikers of known, or which may appear by content, to be gang members or affiliates; acronyms, logos, slogans, symbols, signs, and expressions known, or which may appear by content, to identify a gang or any of its members or affiliates; and identifying numbers, colors, and expressions of a geographic region with which a gang is known, or which may appear by content, to associate; . . .

App. 32 (emphasis added).

On January 21, 1998, Linderman, with the assistance of other police agencies, simultaneously executed the warrants. Linderman did not personally participate in

each execution. He coordinated the efforts and was available to answer questions. App. 14.

Search teams found that there were numerous items that bore evidence of Hells Angels indicia. When officers asked Linderman what to seize, he instructed them to take everything that constituted "indicia" as defined in the warrants. App. 14. Among the items seized were belts, jewelry, plaques, T-shirts, hats, watches, vests, calendars, clocks, sculptures, photographs, a mailbox, a refrigerator door with decals, and a cement portion of the driveway in front of the clubhouse containing the signatures of Hells Angels members, as well as numerous Harley-Davidson motorcycles. App. 14, 18.

B. Proceedings Below

1. District Court

The Hells Angels and certain of its members sued Linderman and others under 42 U.S.C. § 1983, claiming that the warrants lacked probable cause and that the execution violated the Fourth Amendment. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

In a prior order, the court held that the warrants contained probable cause to search for gang indicia. App. 46. But the court found, in the order now before this Court, that Linderman "directed that the warrants be executed in a manner which violated Plaintiffs' constitutional rights." App. 58. The court denied Linderman qualified immunity on this ground concluding that the law was clearly established that it was unnecessarily destructive to seize the large volume of indicia evidence, and that

a sampling was the only reasonable approach in executing the warrants. App. 41, 58-59.

2. Ninth Circuit

The Ninth Circuit, holding jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985), affirmed the denial of qualified immunity in a 2-1 decision. The court first found that it was unreasonable for Linderman to interpret the word "any" in the warrants to mean "all," preferring instead one of several definitions in Webster's Dictionary meaning "some." App. 20. The court next found that even if "any" could be construed as "all," the warrants did not mandate that everything complying with the literal terms of the warrants be seized. App. 20, 21. Notably, the Ninth Circuit also found that Linderman was required to exercise discretion to leave items that came within the literal terms of the warrants. App. 21. Moreover, although it is unclear from the court's ruling, the court apparently also found that an officer can make an otherwise particular warrant unlawfully broad by executing it literally. App. 18, 19.

In finding that the law was clearly established, the court held that "whether a warrant has been executed effectively is tested by reasonableness from the moment of the officer's entry until the moment of departure." *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). App. 16. The court referred to an Eighth Circuit decision addressing a particularity challenge to warrants, which found that warrants issued for the limited purpose of obtaining evidence of gang affiliation diminish in evidentiary value the more that is seized. *United States v. Apker*, 705 F.2d 293, 302 (8th Cir. 1983). App. 18, 19. Thus, the Ninth Circuit held that the state of law provided